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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 501

CITY OF DUBUQUE BRIDGE COMMISSION,
Petitioner,

vs.

THE BOARD OF REVIEW FOR THE CITY OF DUBUQUE, JULIEN TOWNSHIP, DUBUQUE COUNTY, IOWA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JOHN J. KINTZINGER,
City Solicitor of Dubuque, Iowa.
CHARLES S. RHYNE,
Counsel for Respondent.

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ARGUMENT.

No question of due process is available to petitioner under the assignment of errors.

Petitioner's contention in the "Assignment of Errors" that the Supreme Court erred in certain respects does not in and of itself present a Federal Question under the due process clause of the Constitution.

Tracy v. *Genzberg,* 205 U. S. 170;
Bonner v. *Gorman,* 213 U. S. 86;
American Railway Express Co. v. *Kentucky,* 273 U. S. 269, 273;

Bell Telephone Co. of Pennsylvania v. *Pennsylvania Public Utility Commission,* 309 U. S. 30, 32.

I.

Answering Petitioner's Points I and II.

It does not necessarily follow that because of the mere fact that Congress created the Dubuque Bridge Corporation that it is exempt from State taxation.

When Petitioner states:

> "That the Supreme Court of Iowa erred in holding that City of Dubuque Bridge Commission is not a Federal Instrumentality" that Court did not so hold but stated (Pet. Brief p. 16):
>
> "We have no doubt that this was constitutional exercise of a power of Congress, but the conclusion drawn by Appellant that Congress having constitutionality created the Corporation such as the one in question, has created a Federal Instrumentality not subject to State taxation, does not necessarily follow" (R. 93-94).

No reference is made in regard to what respect the Bridge Commission exercises any governmental functions, but the only thing really complained of is that the State tax causes the postponement of the time when the bridge is to be paid for. Can it be urged because thereof that the economic burden of the tax is in some way passed on so as to impose a burden on the National Government tantamount to an interference by one government with the other in the performance of its functions? The theory of the case of *Graves* v. *People of New York,* 306 U. S. 466, is that there must be a substantial interference with the governmental power of the Federal government before such immunity is claimed in the absence of a grant of immunity by Congressional action.

II.

Answering Petitioner's Point III.

The principle of immunity does not extend to anything lying outside of or beyond Governmental functions and their exertion.

On page 21 of the Petition it is stated:

> "It is an interference with Governmental functions because it *prolongs,* if not makes impossible, the accomplishment of the governmental purpose, an interstate highway bridge across the Mississippi river between Dubuque, Iowa and East Dubuque, Illinois, free of toll as soon as the cost is paid."

That is the only reason asserted why they should be immune from state taxation. The question raised as to who will pay the taxes when the bridge is free is a matter for future determination.

The President, in his veto, stated:

> "The effect of this bill would be that, by declaring publicly-owned interstate highway bridges to be Federal instrumentalities, such bridges would thereby be exempt from all State and local taxation. I cannot give my approval to this bill, first, because I can find no compelling reason for making publicly-owned interstate highway bridges Federal instrumentalities, and secondly, because relieving such bridges of all State and local taxation would, in a majority of cases, result in loss of revenue by States and their political subdivisions, necessitating material curtailment of necessary activities, or the imposition of increased tax burdens upon other taxpayers to make up the deficit." (R. 78, 1-14.)

This bridge has been and can be continued to be operated by private enterprise. No governmental functions are connected therewith. Congress, after the Presidential veto,

passed the same Bill as the original Bill, eliminating therefrom the provision for tax exemption contained in the first Bill. The Bridge Commission is not a corporation which the United States owns and controls. The bridge is not a government-owned structure. The Bridge Commission receives no money from the United States Treasury, but receives its money solely from tolls (R. 25, 33-34; 26, 1-10).

The principle of immunity in the cases cited by Petitioner does not extend to anything lying outside of or beyond governmental functions and their exertion, and does not exist where no direct burden is laid upon the governmental instrumentality, and here there is only a remote, if any, influence upon the exercise of the functions of government.

The second group of cases cited by Appellant do not apply for the reason that under the facts in this case there is no substantial burden upon or interference with the governmental functions of the United States and the only effect of State taxation *would be the extension of the time of payment of the outstanding bonds issued by the Commission in the payment of the new bridge.* The holding of the cases generally indicates that the rule is that such immunity not expressly granted must be shown to be an interference with or burden upon the Federal government. Congress declined to pass legislation immunizing the Bridge from State taxation. There is no indication by Petitioner that the imposition of the tax in question upon the old bridge interferes with or puts a burden upon the operation or functions of the Federal government.

The tax here involved is on the old High Bridge which the Commission purchased and is now operating. When the new bridge is completed, the bridge in question will be dismantled. The old bridge will never become a free bridge.

A mere delay in the time when the bridge will become a free bridge cannot be said to be such an interference with

a government function as would authorize its immunity from taxation. This is no substantial or direct interference in any way with the operation of the Federal Government, but only the possible indirect postponement of final payment and is insufficient to grant the immunity.

Graves v. *People of State of New York*, 306 U. S. 466;
Helvering v. *Gerhardt*, 304 U. S. 405.

The cases cited by Petitioner are not applicable because the property concerned in each case, except the *Graves* case, consisted of property of the United States or of a corporation authorized by the United States and in which all the property was government owned.

The decision of the Supreme Court of Iowa is in accordance with the applicable decisions of this Court, and therefore, the claim of a Federal question is without substance.

It shows, therefore, that Petitioner's claim that there is a Federal question which should be reviewed by this Court is devoid of any substantial evidence of immunity and furnishes no basis for an Application for a Writ of Certiorari.

Consolidated Turnpike Company v. *Norfolk & C. Ry. Company*, 228 U. S. 596, 600;
Equitable Life Assurance Society v. *Brown*, 187 U. S. 308, 311, 314.

III.

Answering Petitioner's Point IV.

From the history of this case, silence of Congress in the present Bill (immunity was in the first Bill) implied the State tax is to be paid.

The President vetoed the first Bill because it contained an express provision exempting the Bridge Commission and the bridge from all taxes. Thereafter Congress passed the identical Bill with no tax exemption provision therein.

Congress was fully acquainted with the facts then existing. Congress had no intention of declaring that the Bridge should be exempt from taxes either directly or by designating it a Federal Instrumentality.

The *Graves* case, in reviewing *McCulloch* v. *Maryland*, 4 Wheat. (U. S.) 316, "holds that when the National Government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments." In the present case we have a private corporation, not owned or controlled by the Government. The Bridge Commission, not the Government, controls and operates the bridge.

It is stated in the *Graves* case,

> "it is true that the silence of Congress when it has authority to speak may sometimes give rise to an implication as to the congressional purpose".
>
> "Silence of Congress implies immunity no more than does the silence of the Constitution."
>
> "The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to State Governments."

IV.

Answering Petitioner's Point V.

This is not a so-called Federal question, nor does it involve any right claimed under the Constitution of the United States.

V.

The decision of the Supreme Court of the State of Iowa is in accord with the applicable decisions of this Court.

This has been shown in Point II, *supra.*

VI.

Conclusion.

The petition should be denied.

Dated November 14, 1942.

Respectfully submitted,

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